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No. 712

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In the Supreme Court of the United States

October Term, 1957.

OLIN STONE, ALDA STONE, VERA C. SMITH, FRANCIS A. MILLER, and the WOOD OIL COMPANY, a corporation,
Petitioners,

vs.

DANUBE McFARLIN, MAMIE SUE McFARLIN, DAVE MORGAN, doing business as DAVE MORGAN OIL COMPANY, R. L. TAYLOE, ROSALIND NO EAR, and THE BUREAU of INDIAN AFFAIRS of the DEPARTMENT of INTERIOR of the UNITED STATES of AMERICA,
Respondents.

SUPPLEMENTAL AND REPLY BRIEF TO RESPONDENTS OPPOSITION TO GRANTING THE WRIT.

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IN THE SUPREME COURT OF THE UNITED STATES,
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Respondents.

SUPPLEMENTAL AND REPLY BRIEF TO RESPONDENTS OPPOSITION TO GRANTING THE WRIT.

Statement.

The United States for and on behalf of Rosalind No Ear, a restricted Indian, has filed a response opposing the granting of the writ herein and seeking to uphold the judgments of the lower courts based upon Section 335, Title 60, O. S. A. 1951, which have divested and destroyed the title of petitioners traced to a government patent issued prior to statehood to 9.83 acres of Lot 7 valued in excess of $3,000.00 without compensation, and quieting title to one-half of the minerals therein in Rosalind No Ear, allottee of Lot 9, despite the fact that said 9.83 acres is admittedly not

within the exterior boundaries of Lot 9 as fixed by the government survey. It is apparent that a proper determination of the correctness of the judgment cannot be ascertained without a determination of the following questions:

(1) Is the construction of the aforesaid state statute relating to accretion governed by the decisions of the Supreme Court of the State of Oklahoma?

(2) Did the patent, issued prior to statehood, to the aforesaid lots, bordering upon a nonnavigable stream convey title to each grantee to the center of said stream?

(3) If so, is the title so granted to the center of the stream a valuable right protected by the 5th and 14th amendments of the United States Constitution?

(4) Do the Oklahoma decisions modify the common law as to riparian rights under facts applicable to what has been designated the "Doctrine of submergence and reappearing of land" where the same is capable of being identified by government survey?

We now refer to the above propositions in the order above stated.

(1) The respondent, the United States, in its opposition briefs by citing *Bryan* v. *Chicago Mill and Lbr. Co.*, (C. A. 8, Ark.) 216 F. 2d 727, and *Anderson-Tully Co.* v. *Tingle,* (C. A. 5, Miss.) 166 F. 2d 224, recognizes the general rule that riparian rights upon nonnavigable streams and the law of accretion applicable thereto are governed and controlled by the applicable local law and the decisions of the Supreme Court of the state construing the same.

While the foregoing is a well established rule it is subject to an equally well established qualification, that in dealing with the general subject of beds of streams neither the courts, nor the legislature may adopt a retroactive rule pertaining thereto or adopt any rule or statute which would impair the efficacy of the grant or the use and enjoyment of the property granted. See *Packer* v. *Byrd, et al.*, 137 U. S. 661, 11 S. Ct. 210, 211; *Brewer-Elliott Oil and Gas Co.* v. *U. S.*, (C. A. 8) 270 Fed. 100, 109, affirmed 260 U. S. 77, 43 S. Ct. 60, 64; *U. S.* v. *Champlin Refining Company,* 156 F. 2d 769, affirmed 331 U. S. 788, 67 S. Ct. 1346; and *Alladin Petroleum Co.* v. *State,* 200 Okl. 134, 191 P. 2d 224.

It must be apparent the court below in divesting petitioners of valuable property, a part of which was the river bed and a part upland, traced to a government patent dated October 12, 1895, based upon a state statute has adopted a retroactive rule and therefore in conflict with the authorities above cited.

(2) It is also a well established rule by the state and federal courts of this jurisdiction and this Court that an Indian trust patent issued prior to statehood vests in the patentee not only title to the upland but to the center of the nonnavigable stream. See *Brewer-Elliott Oil and Gas Co.* v. *U. S., supra; U. S.* v. *Elliott,* (10th Circuit), 131 F. 2d 720; *U. S.* v. *Champlin Refining Company,* (10th Circuit) *supra; Hunzicker* v. *Kleeden,* 161 Okl. 102, 17 P. 2d 384; and *Alladin Petroleum Co.* v. *State, supra.*

The respondents do not controvert the above principle of law nor did the courts below, but they sought to circumvent the force and effect of the same by the statement that

said rule had no application, without the citation of any authorities to support said statement.

(3) It must be apparent that before a court can deprive one of a property right vested under federal grant issued prior to statehood, consideration must be given to the source of his title. Such was the holding of this Court in *Choate* v. *Trapp,* 224 U. S. 665, 32 S. Ct. 565. The holding of the lower courts that the source of the title was immaterial or had no application when seeking to deprive one of rights and incidents of title vested under federal grant is error and in conflict with the above decisions.

(4) On page 13 of our original petition we stated our 4th reason for granting the writ as follows:

> "The Supreme Court of Oklahoma in *Hunzicker* v. *Kleeden, supra,* and *Mapes* v. *Neustadt, supra,* has modified the common law of accretion and the force, effect and application of Section 335, Title 60, pursuant to Section 2, Title 12, O. S. 1951;"

and discussed said reason (pages 13-19). We desire to supplement the same by directing the Court's attention to the opinion of this Court in *State of Arkansas* v. *State of Tennessee,* 246 U. S. 158, 38 S. Ct. 301, 305, wherein the Court in discussing the various conflicting rules adhered to by the various stated, referred to what it designated as "The Doctrine of Submergence and Reappearance of Land," defined in *Mulry* v. *Norton,* 100 N. Y. 424, 3 N. E. 583, and quoted therefrom as to the factual situation in which the same was applicable as follows:

> "Land lost by submergence may be regained by reliction, and its disappearance by erosion may be re-

> turned by accretion, upon which the ownership temporarily lost will be regained. * * * that when the water disappears from the land, either by its gradual retirement therefrom or the elevation of the land by avulsion or accretion, or even the exclusion of the water by artificial means, its proprietorship returns to the original riparian owners."

We direct the Court's attention to the fact that the courts uniformly hold under the above rule that it is immaterial whether the land once submerged has been restored by accretion, avulsion, or by artificial means, or regardless of the means of restoration it still remains the property of the original owner. The Court in *Hunzicker* v. *Kleeden, supra,* cited *Mulry* v. *Norton, supra; Assoc.* v. *Shrivner,* 64 N. J. Law 550, 46 Atl. 690; *Stockley* v. *Cissna,* (C. A. 5) 119 Fed. 812, 813; *Keel* v. *Sutton,* 142 Tenn. 341, 219 S. W. 351, 353, and *City of St. Louis* v. *Rutz,* 138 U. S. 226, 11 S. Ct. 337, 346, all of which involve a factual situation where the land had been submerged and reappeared. In syllabi 3 and 4 the Court stated the law and facts which bring the same within the rule designated by this Court in *State of Arkansas* v. *State of Tennessee, supra,* as constituting "The Doctrine of Submergence and Reappearing of Land."

The Supreme Court of Oklahoma adhered to said rule under a similar state of facts in *Mapes* v. *Neustadt, supra,* and the Court of Appeals of the 10th Circuit in *Herron* v. *Choctaw-Chickasaw Nations,* 228 F. 2d 830, from which we quoted in our petition (p. 18), recognized said rule as the settled law in Oklahoma.

We have just received a copy of the reply brief from the remaining respondents in which they cite two cases which we believe should be referred to.

The first case is *Goins* v. *Merryman,* 183 Okl. 157, 80 P. 2d 268. The factual situation therein is different from that involved herein. However, said case was cited and relied upon in *Mapes* v. *Neustadt, supra,* and the Supreme Court of Oklahoma refused to follow the same but adhered to the "Doctrine of Submergence and Reappearing of Land."

The second case is *Littlefield* v. *Nelson,* (C. A. 10) 246 F. 2d 956. The land involved was situated within the State of Oklahoma at a point on the Arkansas River which the parties agreed was navigable. The facts as disclosed by the opinion did not involve land patented from the federal government prior to statehood nor did it involve land which had been submerged and by the water receding had reappeared and was subject to identification and therefore said case was not within the purview of the rule announced in *Hunzicker* v. *Kleeden, supra,* nor was that case cited or referred to in the opinion.

The remaining respondents in their reply brief cite several other Oklahoma cases and cases from the federal courts. However, in none of said cases was the factual situation such as to bring it within the "Doctrine of Submergence and Reappearing of land."

The remaining respondents take the position stated on page 4 of their brief, to-wit:

> "The time and nature of the issuance of the patent without reservations whether trust or otherwise to petitioner's Lot 7 before Oklahoma became a state does not eliminate it from the Law of Accretions, whether it be the common law or later the statutory law based upon the common law."

While it is not clear it would appear that counsel contends that when the federal government prior to statehood issues a patent to land bordering on a nonnavigable stream it does not convey title to the center of the stream as it then exists but only a floating and shifting title that can be impaired or destroyed by the adherence of the state to the common law or by a state statute. If this is counsel's contention the same is in direct conflict with the law announced in *Brewer-Elliott Oil and Gas Co.* v. *U. S., supra,* and other cases heretofore cited to the effect that no state statute can impair or divest title traced to a government patent issued prior to statehood.

This Court in *City of St. Louis* v. *Rutz, supra,* had before it a controversy between the City of St. Louis and a citizen of Illinois as to riparian rights on the Mississippi River the center of which was the dividing line between the states. The court held it was impossible for the owner of land on the west side of the middle of the stream to extend his ownership by accretion to land on the other side of the center situated in the State of Illinois, the title to which was vested by the State of Illinois in the riparian owner. By application of the same rule it would seem when the government has issued its patent to a tract of land to the center of the stream prior to statehood as long as the center can be identified neither of the parties on either side of the center fixed by government survey could claim accretion to the land beyond that fixed by their government grants.

CONCLUSION.

(1) We submit the Supreme Court of Oklahoma is construing riparian rights and Section 335, Title 60, O. S. 1951, in *Hunzicker* v. *Kleeden, supra; Mapes* v. *Neustadt, supra,* and the Court of Appeals of the 10th Circuit in *Herron* v. *Choctaw-Chickasaw Nations, supra,* have, without designating the same by name, followed and applied "The Doctrine of Submergence and Reappearance of Land," as defined by this Court in *State of Arkansas* v. *State of Tennessee, supra,* to cases where the boundary can be definitely ascertained by reverence to government plat and survey. The opinion herein has disregarded said doctrine under factual situations not materially different and applied the common law in direct conflict with the Oklahoma decisions. Thus upon facts not materially different we have the Supreme Court of Oklahoma adhering to "The Doctrine of Submergence and Reappearance of Land," and under a similar state of facts the opinion herein applying the common law and thereby deprived petitioners of 9.83 acres of land valued in excess of $3,000.00, creating a conflict between the decisions of the state courts and the circuit court of appeals, and causing such confusion that this Court should assume jurisdiction.

(2) We submit the opinion is in conflict with the law announced by the Supreme Court of Oklahoma in *Alladin Petroleum Co.* v. *State, supra,* and the decisions of this Court in *Brewer-Elliott Oil and Gas Company* v. *U. S., supra, Champlin Refining Co.* v. *U. S., supra,* and *Choate* v. *Trapp, supra,* holding that no state statute is valid which

seeks to impair or divest title traced to a government patent prior to statehood and therefore violative of the 5th and 14th amendments of the United States Constitution.

(3) We further submit that neither *Goins* v. *Merryman*, 183 Okl. 157, 80 P. 2d 268; *State, ex rel.*, v. *Worden*, 200 Okl. 613, 198 P. 2d 402; *Braddock* v. *Wilkins*, 182 Okl. 5, 75 Pac. 1139; *Criswell* v. *Wilson*, 198 Okl. 47, 175 Pac. 87; *Chase* v. *Cheatham*, 194 Okl. 1, 146 P. 2d 585, nor *Littlefield* v. *Nelson*, (C. C. A. 10) 246 F. 2d 956, involve a factual situation where the doctrine of submergence and reappearance would be applicable nor did the Court in said decisions or either of them refer to the case of *Hunzicker* v. *Kleeden*, *supra*, or *Mapes* v. *Neustadt*, *supra*, or attempt to overrule them. The respondents have not cited a single instance in which this Court has failed to apply the doctrine of submergence and reappearance of land as set forth in *Arkansas* v. *Tennessee*, *supra*, to a factual situation similar to the case at bar.

(4) The opinion below in citing *Goins* v. *Merryman*, *supra*, overlooks the fact that the Supreme Court of Oklahoma in *Mapes* v. *Neustadt*, *supra*, refused to follow or apply the decision therein under a factual situation similar to the facts herein, but applied "The Doctrine of Submergence and Reappearance of Land."

(5) Clearly the opinion in giving and vesting the title to the land involved herein in the respondents herein merely because the river had at one time touched their land, no part of which had been impaired, and when they had all they were entitled to or in good conscience could demand under their patent is certainly not based upon equity or good conscience.

We therefore submit that for the reasons above stated and for the reasons set forth in our petition that a writ of certiorari should be granted.

Respectfully submitted,

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